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No. 15716

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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BEVERLY B. BISTLINE,

*Appellant,*

vs.

UNITED STATES OF AMERICA

*Appellee.*

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## Petition For Rehearing and Brief

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TO THE HONORABLE CIRCUIT JUDGES:  
POPE, FEE, AND HAMLIN:

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## Petition For Rehearing and Brief

### PETITION FOR REHEARING

Appellant respectfully petitions this Honorable Court for a rehearing of the appeal in this cause, and in support of this petition represents to the court as follows:

We reserve our argued position as to each of the points on appeal, but in this petition address ourselves to those features of the decision wherein we believe the court may be convinced its result is based upon the application of incorrect legal principles.

## I.

Therefore this petition is devoted to convincing this court that it has erred in its determination of the main question put to it upon the appeal, to-wit, that the evidence taken as a whole does not support the conclusion reached by the trial court, in that this court has based its opinion upon a large number of inferences, not supported by evidence in the record, same being (From the printed opinion. Italics ours) :

“There are facts from which *a strong inference* can be drawn that F. M. Bistline had held the property for sale in the real estate business.” Page 2, Line 13.

“The reason for not selling some of these properties from 1938 to 1941 was stated by F. M. Bistline \* \* \*” Page 2, Line 33.

“Her attitude was not passive.” Page 2 Line 40.

“There is no doubt that F. M. Bistline handled all of the real estate transactions of his daughter *as her agent, in continuity with his previous dealings therein.*” Line 5, Page 3.

“Although she was fully employed in another enterprise which he owned, she was *in effect* engaged also in the real estate business *as a joint enterprise.*” Line 9, page 3.

“These sales did not wind up her dealings in real estate.” Line 31 page 3.

“He continued to act as a real estate *agent* where before he had listed the properties as owner in his own office *apparently with the knowledge of Beverly.*” Line 5, page 4.

“\* \* \* and there is *an inference* that it was also for sale.”  
Line 13, page 4.

“The money from these sales was reinvested in other real estate.” Line 14, Page 4.

## II.

This petition is also devoted to convincing this court that it has erred in its determination of the case by not giving individual and separate consideration to the *First* and *Second* POINTS in our Statement of Points To Be Relied Upon by Appellant (Tr. 73-77), (appellant’s brief, pages 13 and 14).

It is our position that regardless of whether F. M. Bistline had still owned this property, or whether Beverly owned it or they owned it as a joint enterprise, that the facts surrounding these two sales do not bring them into the category of property being held for sale to customers in the ordinary course of the taxpayer’s trade or business. Both these it is to be observed from the record are special situations. The property under Point 1, was zoned A residential and had no market value as residential lots (Tr. p. 55) because of its rough character, being part of an old gravel pit. Point No. 2, the sale to the Pocatello Heights, Inc., for an apart-

ment site, presents a situation where the uncontradicted evidence shows that sales of this property had been refused (Tr. p. 43) and that the circumstances of its sale was brought about first by a long distance call to Tennessee (Tr. p. 37-40) and then about six months of negotiations. Also that neither of these were listed. (Tr. p. 66).

### III.

While the following has no bearing on the case, we, respectfully petition the court to strike from the opinion the reference to Beverly B. Bistline being an associate of F. M. Bistline, and that each argued the other's case. The court will, we know, concede that this is not part of the record, and the fact is that Beverly since August 1956 has been employed in the law office of Miller & Brown in Studio City, California. We presume the enrollment of this court shows she was admitted to practice in Idaho in 1955.

For the foregoing reasons, this petition for rehearing should be granted.

F. M. Bistline

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R. Don Bistline

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*Attorneys for Appellant,  
Pocatello, Idaho*

STATE OF IDAHO                    )  
   )  
 COUNTY OF BANNOCK            )            SS.

F. M. Bistline, hereby certifies: That he is one of the attorneys for appellant in this cause; that he makes this certificate in compliance with Rule 23 of the rules of this court; that in his judgment the within and foregoing petition for rehearing is well founded and is not interposed for delay.

F. M. Bistline

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*of Counsel for Appellant.*

## BRIEF IN SUPPORT OF PETITION FOR REHEARING

In the presentation of this matter, we do not mean in any manner to be disrespectful. We believe ourselves sincere and correct in our position.

As noted in the petition we have set forth a number of quotations from the opinion, which we contend are not based upon the evidence found in the printed record of the case. We do not deem it unnecessary to go through these item by item, but generally refer to the record in support of our petition. However, there are a few instances, that we will discuss in detail.

In connection with the inference that F. M. Bistline was in the real estate business. The record shows that he sold out in 1945, on the last day of the year. These sales were made in 1947 and 1948. There is no evidence in the record

as to what property he still held or his activities during 1947 and 1948. We feel this inference is not warranted from the record.

With regard to sales not being made on account of income tax bracket, we feel that the court should have quoted the preceding sentence, so that the quotation would read:

“I wasn’t interested in any particular fast sale of these lots. During some of those years the bus business was awfully good, etc. \* \* \*”

With this additional sentence added the evidence shows a passive attitude on the part of the donor. There is no evidence that any sales were rejected on this account.

With regard to the statement that “Her attitude was not passive.” There is no evidence that she or her father or anyone else did anything to make a contact to bring about these sales on her behalf. We refer the court to the witness Coates, (Tr. p. 42,) and Anderson, (Tr. p. 43). Also the evidence of O. R. Baum (Tr. p. 37) and R. H. Smith (Tr. 52) regarding the sales to Pocatello Heights, Inc., and Empire Investment Co.

The court concludes that F. M. Bistline was an “agent” for Beverly. See page 63 of transcript. “I couldn’t sell without her approval. I couldn’t sell her property.”

Idaho Code Section 55-601. “A conveyance of an estate in real property may be made by an

instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing.”

The court also concludes that this was a “joint enterprise.” We have examined the memorandum opinion of the trial court, and no such conclusion was reached therein. In other parts of the opinion the court is insisting that it is bound by the findings of the trial court on findings made on the evidence. We submit that an examination of the record will show no evidence supporting this conclusion.

We can summarize that there is no evidence that these sales did not wind up her dealings in real estate. The only evidence in the record is that a mortgage was foreclosed on three lots, which were deeded to her. This statement will also serve to refute the statement that “The money from these sales was reinvested in other real estate.”

POINT TWO. We have set forth in our petition that the court erred in not giving individual and separate consideration to the properties sold to the Empire Investment Company and the Pocatello Heights, in support of our position in connection therewith we refer the court to our Original Appellant’s brief, as our authority in support of this contention.

POINT THREE. We believe comment is unnecessary.

CONCLUSION. In conclusion, we respectfully urge that the court grant a rehearing of this cause.

Respectfully submitted,

F. M. Bistline,

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R. Don Bistline,

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*Attorneys for Petitioner*